STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2011
v	No. 299318 Wayne Circuit Court
SAMUEL LEWIS RIDDLE, JR., Defendant-Appellant.	LC No. 10-000804-FH

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

After a jury trial, defendant appeals by right his convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felonious assault, MCL 750.82. We affirm.

Defendant first contends that there was insufficient evidence to convict him of felonious assault. We review de novo challenges to the sufficiency of evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). We consider the evidence in the light most favorable to the prosecutor to determine whether a rational juror could have found the prosecutor proved all elements of the charged offenses beyond a reasonable doubt. *Id.*

The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An assault is "'an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Gardner*, 402 Mich 460, 479; 265 NW2d 1 (1978) (internal quotation marks omitted), quoting Perkins on Criminal Law (2d ed), p 117. At issue in this case is the second type of assault—an unlawful act that places another in reasonable apprehension of receiving an immediate battery.

The central inquiry in this appeal is whether a rational person in the victim's position would have reasonably believed that the defendant's behavior threatened an immediate battery. See *People v Davis*, 277 Mich App 676, 685-686; 747 NW2d 555 (2008), vacated in part on

other grounds 482 Mich 978 (2008).[1] The victim in this case testified that she arrived home to find defendant in bed with another woman. After an initial confrontation, the victim left the room. However, she returned with a camera; defendant told her to leave. Defendant then picked up a shotgun from beneath the bed, and the victim heard it make a racking noise. The victim left, went to her car, and called 911. The police arrived and arrested defendant.

The victim testified that she did not think defendant would shoot her and that she did not fear he would assault her. The victim also testified that she did not believe the gun was loaded. However, the existence or lack of a victim's subjective fear is not determinative of whether an assault occurred. See *Davis*, 277 Mich App at 685-686, 687-688. On the basis of the record, we conclude that a rational person in the victim's position would have reasonably believed that defendant's conduct threatened a battery.

There was also sufficient evidence for a rational juror to find that the other elements of felonious assault and felony-firearm were proven beyond a reasonable doubt. Defendant committed an assault with a gun, a dangerous weapon under the statute, see MCL 750.82(1), and with the intent to injure or place the victim in reasonable apprehension of an immediate battery. See *Avant*, 235 Mich App at 505. Defendant's intent to place the victim in reasonable apprehension of an immediate battery can be inferred from defendant's conduct and the circumstances. Cf. *People v Lawton*, 196 Mich App 341, 349-350; 492 NW2d 810 (1992). Defendant also possessed a firearm during the commission of felonious assault, satisfying the elements of felony-firearm. See *Avant*, 235 Mich App at 505. Accordingly, we conclude there was sufficient evidence to support defendant's felonious assault and felony-firearm convictions.

Defendant next contends that the prosecutor committed misconduct by repeatedly racking the shotgun during closing argument. Defendant did not object at trial to the prosecutor's actions. Therefore, we review defendant's contention for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). In reviewing for plain error, this Court will reverse only if it determines that defendant was "actually innocent" or "the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

The plain error rule has three requirements: (1) an error occurred, (2) the error was clear or obvious, and (3) the error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "[W]here a curative instruction could have alleviated any prejudicial effect [this Court] will not find error requiring reversal." *Ackerman*, 257 Mich App at 449. Reversal is warranted when the defendant is actually innocent or the error "'seriously affect[ed] the fairness, integrity or public reputation of

[1] The precedent at issue here was decided in *People v Perez*, dec'd sub nom *People v Davis*, 277 Mich App 676, 684-688, 747 NW2d 555 (2008). Our Supreme Court vacated *Davis* in part and remanded in part. *People v Davis*, 482 Mich 978; 755 NW2d 186 (2008). Our Supreme Court denied leave to appeal in *Perez*. *People v Perez*, 482 Mich 894; 753 NW2d 206 (2008).

judicial proceedings.'" *Carines*, 460 Mich at 763-764 (internal quotation marks omitted), quoting *US v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant argues that the prosecutor's repeated racking of the shotgun was error because it implied facts not supported by the evidence, it intimated the jury, and it improperly bolstered the victim's credibility by implying that her testimony was truthful. We disagree. "[T]he prosecutor is permitted to argue the evidence and all reasonable inferences arising from it." *Thomas*, 260 Mich App at 454. In this case, the victim testified that defendant racked the shotgun, and the shotgun itself was admitted into evidence. The prosecutor's actions were thus permissible on the basis of the evidence.

The prosecutor's conduct must be considered "in context" and "in light of defendant's arguments." *Thomas*, 260 Mich App at 454. At issue in this case, as discussed above, was whether a rational person in the victim's position would have reasonably apprehended an immediate battery. Therefore, it appears that the prosecutor's act of racking the shotgun was intended to demonstrate to the jury how a reasonable person would feel or react upon hearing the sound of the shotgun racking. This Court has stated that "[i]t is counsel's duty to use all legitimate means to convince the jury or the court that a finding for his client will be in accord with justice." *People v Mischley*, 164 Mich App 478, 482-483; 417 NW2d 537 (1987).

Additionally, it does not appear that the prosecutor was improperly vouching for the credibility of the victim by implying a special knowledge of her truthfulness. See *Thomas*, 260 Mich App at 455. Rather, the prosecutor was demonstrating the sound of racking the shotgun. The jury was free to determine the credibility of the victim and whether defendant racked the shotgun at all.

Even assuming that a clear and obvious error occurred, defendant has not established the third requirement—prejudice. See *Carines*, 460 Mich at 763. Where a curative instruction would have alleviated the prejudice, this Court will not find error requiring reversal. *Ackerman*, 257 Mich App at 449. Had defendant objected during the prosecutor's closing argument, the court could have issued a curative instruction. See *Thomas*, 260 Mich App at 455. Moreover, the trial court's instruction to the jury that it "may only consider the evidence that has been properly admitted in this case" and that "[t]he lawyers' statements and arguments are not evidence," cured any prejudice. See *People v Parker*, 288 Mich App 500, 512; 795 NW2d 596 (2010).

Finally, even assuming a plain error occurred that affected substantial rights, reversal is not warranted. There is no basis to conclude that the prosecutor's action resulted in the conviction of an actually innocent defendant or seriously affected the fairness of the trial. See *Ackerman*, 257 Mich App at 449. The jury could have found that defendant racked the shotgun based on the victim's testimony. Accordingly, we conclude that the prosecutor's act of repeatedly racking the shotgun was not plain error requiring reversal.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell